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In the Supreme Court of the United States

October Term, 1945

[illegible] Investment Co., Inc., Appellant,

vs.

[illegible] Bureau of Revenue and Commissioner Appellees.

APPEAL FROM THE SUPREME COURT OF THE UNITED STATES FOR THE [illegible] OF NEW YORK

BRIEF FOR APPELLEE

In the District Court of the United States for the Southern District of New York

Civil No. 27–352

McALLISTER LIGHTERAGE LINE, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree[1] entered on August 9, 1945, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. Appeal was allowed on October 8, 1945, and appeal papers[2] were served on October

[1] The Court also rendered an opinion, dated July 16, 1945.

[2] The appeal papers did not include the notice to the Attorney General of the State of New York required by 28 U. S. C. 47a.

15, 1945. The Commission's order, dated February 7, 1944, confirmed the decision of Division 4 of the Commission (issued on July 28, 1942) denying appellant a certificate as a common carrier by water under the "grandfather clause" of Section 309 (a) of Part III of the Interstate Commerce Act, as amended (40 U. S. C. 909 (a)).[3]

Appellees submit that the appeal presents no substantial question, and that the decree of the District Court should be affirmed without argument. The ground upon which the District Court based its decision is conclusive and sufficient to dispose of the case. That ground is lack of continuity of operation following the "grandfather" date of January 1, 1940. A water carrier under Part III of the Act, like motor carriers under Part II, in order to obtain "grandfather" rights, must prove not only that "such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940," but also that such applicant "has so operated since that time" to the date of the Commission's decision on the application, except "as to interruptions of service over which the appel-

[3] Applicant had also originally applied for a permit as a contract carrier, and for a certificate as a common carrier under the public convenience and necessity provisions of Section 309 (c); but the application was amended by eliminating the request for a permit, and the Commission's denial of a certificate under the public convenience and necessity provisions was not challenged or involved in the suit in the District Court.

lant * * * had no control" (sec. 309 (a)). See *United States* v. *Maher*, 307 U. S. 148, 155–156; *Gregg Cartage Company* v. *United States*, 316 U. S. 74, 78; *Turner* v. *United States*, 56 F. Supp. 798 (M. D. N. C.), affirmed, 323 U. S. 674.

The District Court stated its *ratio decidendi* in the following language:

> There was no proof whatever of subsequent [non-exempt] operation [*i. e.*, after the "grandfather" date] and the Commission found both that the applicant "is not holding itself out at the present time to perform such [non-exempt] transportation" and that it "has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor."[4] This makes unimportant any deficiency in the findings as to the interruption of service before January 1, 1940. We think the Commission's findings above quoted necessarily imply that the petitioner's failure to resume the interrupted service after January 1, 1940, was not due to causes beyond its control.

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[4] Under Section 303 (g), transportation in interstate commerce by water solely within the limits of a single harbor is exempt from regulation under the Act, unless the Commission finds that the national transportation policy requires regulation.

A water carrier's "grandfather" rights (other than chartering) must be based on transportation subject to regulation under the Act. See *The Barrett Line, Inc.* v. *United States*, No. 630 October Term, 1944, decided June 18, 1945, slip op. 11.

The facts found by the Commission with respect to appellant's operation as a water carrier show that appellant or its predecessors have been engaged in marine transportation since 1864, and the business has been continuously owned by its founder or his descendants through four generations. It is also undisputed that appellant's activities in the past have been varied, extensive, and at one time world-wide in scope.

However, notwithstanding the magnitude of its operations during a past period of its history, it is equally undisputed that since 1933 appellant's operations have been confined primarily to the New York Harbor area. As found by the Commission:

> The evidence of record establishes the fact that applicant for a period of over ten years has performed only an inconsequential amount of transportation of a kind that is now subject to the act, and that it is not holding itself out at the present time to perform such transportation. Obviously the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since. Furthermore, applicant has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor. We affirm the conclusion of the prior report that applicant has not established that it is entitled to "grandfather" rights.

In the light of these findings, appellees submit that the District Court could with propriety have gone further than it did, and could have upheld the denial of appellant's application upon the ground of remoteness. In *The Barrett Line, Inc.* v. *United States*, No. 630 October Term 1944, decided June 18, 1945, this Court held that past water carrier operations prior to January 1, 1936, might be disregarded as too remote. Consequently, like the Commission, the District Court could have treated appellant's operations prior to 1933 as too remote. Moreover, since it was decided in *Gregg Cartage Company* v. *United States*, 316 U. S. 74, that bankruptcy is not to be deemed an interruption of service over which a carrier has no control, it follows *a fortiori* that appellant's prudent retrenchment of the scope of its water carrier operations following the economic depression of 1930, thus avoiding bankruptcy, should also be regarded as a voluntary course of conduct within appellant's control and accordingly not an "interruption of service over which the applicant * * * had no control" (sec. 309 (a)).

Hence if it were necessary or material for the decision of the case, appellees would argue that it was not necessary for the Commission to decide, as a question of fact, and to make definite findings with regard thereto, whether the lack of service during the period immediately prior to January 1, 1940, was or was not due to an inter-

ruption over which appellant had no control. The District Court, with meticulous caution, observed in this connection that:

> It is true that the Commission did not make a definite finding that the interruption in service before January 1, 1940, either was or was not beyond the control of petitioner and its predecessors, and if decision were wholly dependent upon the fact as to that matter the petitioner would have substantial ground for insisting that the cause be remanded to the Commission for a finding on that point. * * *
>
> Decision, however, does not depend entirely upon what the petitioner or its predecessors did or failed to do on or before January 1, 1940.

The District Court placed its decision upon a wholly unassailable ground, *viz.*, lack of continuity of service following the "grandfather" date of January 1, 1940, with regard to which the findings of fact made by the Commission are definite, specific, and uncontroverted.

It is, therefore, respectfully submitted that the decree of the District Court should be affirmed since the appeal presents no substantial question.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General.

Daniel W. Knowlton,
Daniel W. Knowlton,
Chief Counsel, Interstate Commerce Commission.

October 1945.

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